CONTENTS OF APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ED PETER MACK, NATHANIEL GOSHA, III, and LAWRENCE C. PRESLEY, individually and on behalf of others similarly situated,	)	[Filed Aug. 1, 1990]
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 89-T-459-E
RUSSELL COUNTY COMMISSION and ETOWAH COUNTY COMMISSION,	)	
Defendants.	)	

ORDER

Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge, and THOMPSON, District JUDGE.

JOHNSON, Circuit Judge:

This three-judge district court is convened pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1990) to hear the plaintiffs' claims under section 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973c (West 1981) ("Section 5"). Plaintiffs Ed Peter Mack and Nathaniel Gosha III are the only black members of the Russell County Commission, representing single-member districts 4 and 5, two of the three districts in Russell County with black voting majorities. Plaintiff Lawrence C. Presley is the only black member of the Etowah County Commission, representing single-member district 5, the only district in Etowah County with a black voting majority. Each of the named plaintiffs represents a certified class consisting of the black voters in their respective districts. By order of this court entered on March 8, 1990, the United

States Department of Justice was requested to participate in this case, and it has filed a brief and presented argument as *amicus curiae* on behalf of the plaintiffs. The sole issues before this court are whether three changes in the local governance of Russell and Etowah Counties — one change effected by Russell County in 1979, and two changes effected by Etowah County in 1987 — constitute changes in a "standard, practice, or procedure with respect to voting" subject to preclearance under section 5.

I. FACTS

A. *Russell County*

On November 1, 1964, the Russell County Commission was composed of three commissioners elected at large from the entire county under a "residency district" system, whereby a candidate for any given seat is required to reside in the separate district associated with that seat, but is voted upon by the county-wide electorate. Pursuant to a 1972 federal court order, *see Anthony v. Russell County*, Civil Action No. 961-E (M.D. Ala. Nov. 21, 1972) (Varner, J.), the Commission was increased in size to five members, also elected under an at-large residency-district system. A fourth residency district consisting of Phenix City, the largest city in Russell County, was created and assigned two commissioners. While the record is somewhat unclear and is subject to some dispute between the parties, we find the facts relevant to our decision here to be reasonably clear and undisputed. Following the 1972 restructuring,[1] the three rural commissioners each maintained separate authority over three county "road shops," each with its own road crew and equipment. The rural commissioners were separately responsible for managing and supervising road and bridge repair and construction, out of their respective road shops, within "road districts" essentially congruent with their respective residency districts.[2] The commissioners had indepen-

---

[1]While the evidence is sparse as to the system prevailing prior to 1972, it appears that the district system had remained essentially unchanged since 1964.

[2]While it appears that Russell County has occasionally done some road work within Phenix City, the parties agree that municipal roads have traditionally been funded and maintained separately from county roads.

dent authority to set road-work priorities for their districts, buy equipment for their road shops, and hire, fire, and supervise personnel in their road crews. While the record is somewhat ambiguous as to the commissioners' autonomy in budgetary matters, it appears that at least routine repair and maintenance work and routine purchase orders were subject to approval by individual commissioners without a vote of the entire Commission.[3] The county engineer under the foregoing "district system" was limited to providing engineering and surveying services to the separate road shops, and to running a county-wide asphalt crew responsible for fixing potholes.

On May 18, 1979, following an investigation into corruption in Russell County's road operations which led to the indictment of one commissioner, the Russell County Commission unanimously passed a resolution "to place all County road construction, maintenance, personnel and inventory under the supervision of the County Engineer effective immediately and to request the Russell County Legislative Delegation [to] pass the necessary legislation to implement this change." Although it appears that the Commission already possessed ample authority under state law to adopt this "unit system" for managing road work,[4] Russell County's state representative sponsored the enactment, on July 30, 1979, of Act No. 79-652, 1979 Ala. Acts 1132, which ratified the May 18 resolution and provided, in principal part:

> **Section 1.** All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

---

[3] It appears that funding for new construction and major repair projects was subject to vote by the entire Commission.

[4] Ala. Code § 23-1-80 provides that county commissioners shall "have general superintendence of the public roads, bridges and ferries within their respective counties," and Ala. Code § 11-6-3 provides that county engineers, "subject to the approval and direction of the county commission," shall have general supervisory authority over county roads and bridges.

Under the unit system, the separate road districts were abolished and all county road operations were placed under the direct authority of the county engineer, an official appointed by, and responsible to, the entire Commission. The county engineer has consolidated the road shops from three to two in number,[5] and has substantially reduced and streamlined the road work force.

Pursuant to a 1985 consent decree, *see Sumbry v. Russell County*, Civil Action No. 84-T-1386-E (M.D. Ala. March 17, 1985), the Russell County Commission was enlarged to seven members elected from single-member districts rather than at large. This consent decree was duly precleared under Section 5 by the Department of Justice. Plaintiffs Mack and Gosha were elected in 1986 pursuant to this consent decree, becoming the first black county commissioners in Russell County in modern times.

B. *Etowah County*

On November 1, 1964, the Etowah County Commission was composed of five members, four elected at large from four residency districts, and a chairman elected at large with no residency requirement. Each of the four residency districts constituted a road district, and the commissioner from each residency district exercised complete supervision and control over the road shop, equipment, and road crew of that district. With regard to road operations, Etowah County thus appears to have operated under a district system essentially similar to that prevailing in Russell County prior to 1979. The record is unclear as to the precise allocation of budgetary authority under Etowah County's system, but it appears that road funds, after being initially divided up by vote of the entire Commission according to a projection of the needs of each district, were subject to the individual control and discretion of each commissioner regarding priorities *within* that commissioner's district. The chairman's responsibilities were limited to overseeing the solid waste authority, preparing the budget, and managing the courthouse building and grounds.

Pursuant to a 1986 consent decree, *see Dillard v. Crenshaw County*, Civil Action No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986),

---

[5]Apparently, the third road shop is still in existence, but is now used only for storage.

the Etowah County Commission has been phasing in a new single-member-district structure. This consent decree was duly precleared under Section 5 by the Department of Justice in October 1986. Under the new structure, the Commission will have six members elected from single-member districts rather than at large. Two new commissioners were elected from single-member districts 5 and 6 in December 1986, joining the four incumbent members elected at large from the old residency districts. Beginning in January 1987, when the two new commissioners took office, the incumbent at-large chairman was deprived of his vote; he will serve out his term through January 1993, however, after which the chairmanship will be rotated among the six commissioners. One of the two commissioners elected in December 1986 is plaintiff Presley, the first and only black commissioner, from district 5; the other is Billy Ray Williams, who is white, from district 6. Elections for single-member districts 2 and 3 were held in 1988, and two of the four incumbent at-large members, Billy Ray McKee and Jesse Burns, successfully ran for those seats. The seats for single-member districts 1 and 4 will be filled by election in November 1990; thereafter, either two or four commissioners, will be elected every two years, to serve four-year terms. The current commissioners for district 1 and 4 are the other two members of the old Commission, M. Thomas Smith and W.A. Lutes. Thus, the voting membership of the Commission since January 1987 has consisted of the four "holdover" commissioners (two of whom have since been elected from single-member districts and two of whom face reelection or defeat this year from single-member districts), and the two new single-member-district commissioners elected in 1986, Presley and Williams.

The 1986 consent decree provided that the two new commissioners elected in 1986 "shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at large." On August 25, 1987, however, the Commission passed a resolution ("the road supervision resolution"), over the "no" votes of Commissioners Presley and Williams, providing that each of the four holdover commissioners would continue to "oversee and supervise the road workers and the road operations assigned to the road shop" in their respective districts. The resolution further provided that the four holdovers "shall

jointly oversee, with input and advice of the County Engineer, the repair, maintenance and improvement of the streets, roads and public ways of all of Etowah County." The four holdovers thus retained complete day-to-day control over all county road operations, although they no longer represented the entire county, and although one of the road shops is now physically located within Presley's district. Presley's and Williams's districts, which are centered on the city of Gadsden,[6] contain, respectively, 0.3% and 4% of the county road mileage in Etowah County; the other four districts contain between 16% and 30% each of the county road mileage. The resolution provided that Presley would oversee maintenance of the county courthouse and Williams the operation of the engineering department; Presley and Williams were to share supervision of the county farmers' market. There is no evidence that the four holdover commissioners gave up any of their supervisory authority over road operations between January 1987, when Presley and Williams took office, and the passage of the resolution. Thus, the August 1987 resolution appears to have simply ratified a *de facto* allocation of authority on the new six-member Commission with had existed since January 1987.

Also on August 25, 1987, the Etowah County Commission passed a resolution ("the common fund resolution") providing that

> all monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County [shall] be placed and maintained in common accounts, [and shall] not be allocated, budgeted or designated for use in districts, and [shall] be used county-wide in accordance with need, for the repair, maintenance and improvement of all streets, roads and public ways in Etowah County which are under the jurisdiction of the Etowah County Commission.[7]

---

[6]As in Russell County, it appears that municipal road work in Etowah County has traditionally been funded and carried out separately from that of the county.

[7]The resolution also provided that monies already budgeted separately by districts for 1986-87 should remain in those districts, and that any such funds left over at the end of the 1986-87 fiscal year should be carried over as district allocations for 1987-88.

This resolution was also passed over the "no" votes of Presley and Williams. The effect of the common fund resolution appears to have been to shift control over the allocation of road funds *within* each district from the respective individual commissioners to the Commission as a whole. The common fund resolution did not, however, work any change in the entire Commission's authority, as a body, to determine the initial allocation of funds *among* the various districts. To a large extent, the common fund resolution appears to have merely recast in form, without changing in substance, the manner in which the entire Commission sets budget priorities, from a system of designating funds on a district-by-district need basis to one of designating funds on a county-wide need basis without regard to district lines. Since 1987, the road budget for Etowah County has been passed each year by a 4-2 vote with Presley and Williams dissenting.

C. *Procedural History*

On May 5, 1989, the plaintiffs filed a complaint with the District Court for the Middle District of Alabama alleging racially discriminatory governance of road operations in Russell and Etowah Counties in violation of previous court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1981), and section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (West 1981 & Supp. 1990).[8] On December 22, 1989, the plaintiffs were granted leave to file an amended complaint in the district court reasserting the foregoing claims and adding the claim that Russell County had improperly failed to preclear under section 5 the 1979 change to the unit system of managing road operations. This court was designated to hear the section 5 claim against Russell County on December 26, 1989. On February 8, 1990, the plaintiffs filed a second amended complaint adding the claims that Etowah County had improperly failed to preclear under section 5 the 1987 road supervision and common fund resolutions. This court was designated to hear those claims on February 20,

---

[8]The original complaint also included claims against Escambia County, which were voluntarily dismissed on October 30, 1989.

1990. The district court's trial of the section 2 and related substantive claims against both Russell and Etowah Counties has been continued pending this court's disposition of the section 5 claims. On November 24, 1989, the Department of Justice requested that Russell County submit the 1979 change for preclearance, but Russell County declined. As noted above, the Department of Justice has participated in this case as amicus curiae, taking the position that all three disputed changes are subject to preclearance under section 5.

II. ANALYSIS

A. *Controlling Law*

Under section 5 of the Voting Rights Act, certain jurisdictions, including the State of Alabama and its political subdivisions, are required to preclear any change in a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964," by seeking approval of such a change from either the United States District Court for the District of Columbia or the Department of Justice. *See* 42 U.S.C.A. § 1973c (West 1981).[9] The only issues before the three-judge court in a challenge to a jurisdiction's failure to preclear a change are "(1) whether [the] change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate." *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). We need not consider the second factor because it is not disputed that none of the changes at issue in this case has in fact been precleared.

It is well established that in deciding the coverage issue, "it is not our province . . . to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect . . . Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination." *NAACP v. Hampton County Election Comm'n*, 470

---

[9]With respect to certain jurisdictions, the relevant benchmark dates are November 1, 1968, or November 1, 1972. *See* 42 U.S.C.A. § 1973(b) (West 1981).

U.S. 166, 181 (1985) (emphasis in original).[10] As a general matter, it is also established that section 5 should be interpreted so as to give it "the broadest possible scope," *see United States v. Sheffield Board of Comm'rs*, 435 U.S. 110, 122-23 (1978); *Allen v. State Board of Elections*, 393 U.S. 544, 567 (1969), and that Congress intended to reach all changes affecting voting, no matter how small or minor, *see Allen*, 393 U.S. at 566, 568; 28 C.F.R. § 51.12 (1989). As Judge Vance noted in his opinion for the court in *Hardy v. Wallace*, 603 F. Supp. 174, 178 n.6 (N.D. Ala. 1985) (three-judge court), "[t]he courts and Congress have sent a clear message to allow § 5 a wide scope to combat subtle and insidious evasions of the law." Furthermore, it is immaterial whether a change occurs formally or informally, through state statute, local ordinance or resolution, or administrative act. *See Hampton*, 470 U.S. at 178.

Because of the factual posture of this case with regard to Etowah County, we must address the issue of the relevant benchmark against which to measure a purported "change" for section 5 purposes. In assessing whether a purported change is in fact a "change affecting voting," the language of section 5 suggests that the change should be compared only with the regime "in force or effect on November 1, 1964." *See* 42 U.S.C.A. § 1973c (West 1981); *see also* 28 C.F.R. § 51.2 (defining "change affecting voting"). The regulations governing the Department of Justice's substantive consideration of a change after it has been submitted for preclearance provide, however, that in assessing the discriminatory or retrogressive effect of a change, the proper benchmark for comparison is the regime "in effect at the time of the submission," taking into account duly precleared changes which have occurred subsequent to the original statutory benchmark date. *See* 28 C.F.R. § 51.54(b)(1). The foregoing approach strongly implies that the initial assessment of whether a change affecting

---

[10] *See also Allen v. State Board of Elections*, 393 U.S. 544, 558-59 (1969) ("The only issue is whether a particular [change] is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement."); *Robinson v. Alabama State Dep't of Education*, 652 F. Supp. 484, 486 (M.D. Ala. 1987) (three-judge court) (Thompson, J.) ("[A] three-judge court ... need not determine, indeed should not determine, whether a change has in fact had a discriminatory purpose or effect. ... The question, instead ... is whether the change has the potential for discrimination.").

voting has in fact occurred should also rest on a comparison, not simply with the regime prevailing in 1964, but with that regime as modified by any subsequent duly precleared changes. Notwithstanding the plain statutory language, which might be read to require otherwise, this Court has previously interpreted section 5 in accordance with the foregoing approach. *See Henderson v. Graddick*, 641 F. Supp. 1192, 1201 (M.D. Ala. 1986) (Johnson, Hobbs, and Thompson, JJ.) (per curiam), *appeal dismissed*, 479 U.S. 1023 (1986) ("Once a law has been precleared . . . any change in the law or any practice inconsistent with the law must itself be precleared or be a violation of Section 5."); *see also Kirksey v. Allain*, 635 F. Supp. 347, 348 (S.D. Miss. 1986) (three-judge court) (holding subject to preclearance any voting law "which is different from that in force and effect on November 1, 1964 . . . or which is different from a statute that has been precleared pursuant to § 5"); *Dotson v. City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (three-judge court), *summarily aff'd*, 456 U.S. 1002 (1982) (rejecting city's attempt to revert without preclearance to 1964 boundaries, where elections had been conducted since 1964 in accordance with post-1964 annexations which were themselves ultimately precleared). We therefore measure the purported changes in this case against the benchmark of the 1964 regime as modified by any intervening duly precleared changes.

The disputed changes in this case do not fall readily into the traditionally recognized categories of changes affecting voting, such as rescheduling of elections and filing periods, *see id.* at 176-81, changes in candidate residence requirements, *see Rome v. United States*, 446 U.S. 156, 160-61 (1980), annexations, *see Richmond v. United States*, 422 U.S. 358, 362 (1975), reapportionment and redistricting plans, *see Georgia v. United States*, 411 U.S. 526, 535 (1973), locating of polling places, *see Perkins v. Matthews*, 400 U.S. 379, 387 (1971), or marking ballots so as to identify voters, *see Turner v. Webster*, 637 F. Supp. 1089, 1091-92 (N.D. Ala. 1986) (three-judge court) (Vance, J.). The Supreme Court has noted in dicta, however, that "reallocation[s] of authority" among government officials or bodies may constitute changes affecting voting under section 5. *See McCain*, 465 U.S. at 250 n.17.

In *Horry County v. United States*, 449 F. Supp. 990 (D.D.C. 1978)

(three-judge court), a case arising from South Carolina, the court addressed a change in county governmental structure from a system where county commissioners were appointed by the state governor upon the recommendation of the county's state legislative delegation to a "home rule" council-administrator system with the members and chairman of the council elected at large by the voters of the county. Under the old system, the chairman of the board of commissioners had also been elected at large by county voters. While the chairman of the board of commissioners under the old system "had direct charge of construction and repair of all roads and bridges in the county," *id.* at 993, however, the chairman of the new county council had no more power than any other commissioner, except for the authority to call special meetings on short notice. *See id.* at 994. "[T]he administrative functions formerly performed by the chairman of the County Board of Commissioners are performed by the administrator employed by the Council." *Id.* The court held that the fundamental change from appointment to election as a means of choosing the county's governing body was subject to section 5 preclearance. *See id.* at 995. The court also held:

> An alternative reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements.

Id.

In *Sumter County Council v. United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court), which, like *Horry*, involved a change in county governance under South Carolina's Home Rule Act, the county contended that no change affecting voting had taken place because both the county legislative delegation, which by custom had exercised *de facto* power to choose the county commissioners and govern the county, and the new county council were elected at large. The court found this argument "facile" because it

> simply ignore[d] the Governor's *de jure* power -[prior to the change] to appoint the county's governing body, the Governor's *de jure* power to veto legislation (including local bills for Sumter and other counties) and the *de jure* power of the entire General Assembly to enact local laws for Sumter County different from those recommended by the Sumter County delegation. The . . . argument also ignores the legal fact that the Governor and the majority of the legislators who had the actual and legal powers to govern Sumter County were not elected at-large by the voters of Sumter County; they were elected by the voters of the entire State of South Carolina.

Id. at 700-701 (footnote omitted). The court's conclusion that the change affected voting and was covered by section 5 appears to have been based in large part on its finding that "[i]t eliminated the power of South Carolina voters outside Sumter County over that County's local affairs." *Id.* at 701. Like *Horry, Sumter* thus involved a reallocation of authority among "officials voted upon by different constituencies."

In *Hardy v. Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), the court reviewed a change affecting the method of choosing the Green County Racing Commission. The Commission had consisted of three members appointed by the local state legislative delegation. Following federal court approval of a reapportionment plan which made it likely that Greene County would elect a black state senator and a black state representative, the state legislature, at the instigation of Greene County's incumbent white legislators, passed a law giving the governor power to appoint all three members of the Commission. *See id.* at 175-76. The court, noting that "[t]he most relevant attribute of the challenged act is its effect on the power of the voters rather than any aspect of the electoral process," *id.* at 178, found the change covered by section 5 because it reallocated authority over an agency handling the bulk of the county's revenue from officials subject to indirect local control and chosen by legislators responsible only to local voters, to officials chosen by the governor, more than 99% of whose constituents lived outside the county. *See id.* at 179. *Hardy* thus involved an extreme example of the kind of real-

location found covered in *Horry* and *Sumter*. The court cautioned, however, that

> [t]he ordinary or routine legislative modification of the duties or authority of elected officials or changes by law or ordinance in the makeup, authority or means of selection of the vast majority of local appointed boards, commissions and agencies probably are beyond the reach of section 5, even given its broadest interpretation.

Id. at 178-79. The court noted that its "conclusions in this case are reached within the ambit of its peculiar facts," and "should not be read to support a requirement of section 5 preclearance in the myriad of conceivable situations that are somewhat analogous but lack the attributes that we have expressly found to be determinative." *Id.* at 179.

Finally, we note that in *Robinson v. Alabama State Dep't of Education*, 652 F. Supp. 484 (M.D. Ala. 1987) (three-judge court) (Thompson, J.), the court found covered under section 5 a transfer of authority over the City of Marion's public schools from the Perry County Board of Education, whose members were elected county-wide, to a new Marion City Board of Education appointed by the city council, whose members were elected city-wide. The court found that the change affected voting because it "changed the *constituency* that selected those who supervised and controlled public schools within the city." *Id.* at 486 (emphasis in original).[11] The potential for discrimination in *Robinson* was especially obvious because the voting-age population of Perry County was 60% black, while Marion was 52% white. *See id.* at 485.

The principle we draw from *Horry*, *Sumter*, *Hardy*, and *Robinson* is that reallocations of authority will generally be held to affect voting in a manner sufficient to subject them to preclearance under section 5 where they effect a significant relative change in the powers exercised by governmental officials elected by, or re-

---

[11]The court also found the change covered by section 5 because it "changed the ***means*** by which the board members who governed city schools were selected," from a system of direct election by county voters to a system of appointment by the city council. *Id.* (emphasis in original).

sponsible to, substantially different constituencies of voters.[12] The potential for discrimination in most such reallocations derives from the fact that identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies. This general principle must be tempered, however, by *Hardy*'s implicit admonition that relatively minor or inconsequential reallocations of authority, even though involving some shift in authority between local officials with different constituencies, will not *invariably* rise to the level of a change with significant potential impact on voting rights. *See Hardy*, 603 F. Supp. at 178-79. For example, *Sumter* and *Hardy* suggest that section 5 preclearance is most clearly indicated where all or virtually all of the powers of a given governmental body are shifted to officials with different constituencies. At the same time, we hasten to observe that we do not presume to have stated a "general theory" of reallocations of authority applicable to all conceivable section 5 cases. It is conceivable, though we think unlikely, that some reallocations of authority not involving officials with different constituencies might nevertheless have significant potential impact on voting rights. Given the facts of this case, however, we need not explore such a hypothetical possibility.

---

[12]The dissent misconstrues both *Horry* and our reliance upon *Horry* in criticizing the reasoning by which we draw this principle from the four cases discussed above. The dissent asserts that "[n]one of these cases purports to say that a reallocation of authority can have a potential for discrimination *only if* there is a change in constituencies," dissenting op. at 12 [A-41] (emphasis in original), while ignoring the fact that all four of these cases in fact involved reallocations between officials with dramatically different constituencies. We do not suggest that the principle we derive can be lifted verbatim from any of these cases; it is in the very nature of caselaw development to draw inferences and make logical extensions from the holdings and factual contexts of previous cases. The "alternate reason" relied upon by *Horry* for holding the change in that case subject to preclearance, upon which the dissent focuses, did not involve the reallocation-of-authority theory at all, but rather referred to a change in the means of selecting an entire governmental body. We agree that such a change would probably require section 5 preclearance, but as discussed below in Part II(B)(1), no such change is implicated in this case. Our reliance upon *Horry* and the other cases is limited to the context of reallocations of authority, and *Horry* explicitly limited its reliance on the *reallocation-of-authority theory* to those cases involving reallocations "among elected officials *voted upon by different constituencies*." *Horry*, 449 F. Supp. at 995 (emphasis added).

We now proceed to apply the principles discussed above to the disputed changes in this case. In doing so, we note that while the Department of Justice urges us to find these disputed changes covered by section 5, the regulations issued by the Department do not provide any specific guidance on the coverage of reallocations of authority.[13] While it is established that the Department's interpretation of section 5 is entitled to "considerable deference," *Hampton*, 470 U.S. at 178-79; *see also Sheffield*, 435 U.S. at 131, that interpretation is "not binding on this or any other court." *Lucas v. Townsend*, 698 F. Supp. 909, 911 (M.D. Ga. 1988) (three-judge court). We believe that is especially so where the Department has not formalized its interpretation by promulgating applicable regulations. Therefore, while we give careful and deferential consideration to the views of the Department as *amicus curiae*, we reach an independent judgment on the issues presented here.[14]

---

[13]The Department has stated: "While we agree that some reallocations of authority are covered by Section 5 (*e.g.*, implementation of 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way." 52 Fed. Reg. 486, 488 (Jan. 6, 1987).

[14]In addition to the reallocation-of-authority theory, the plaintiffs and the Department of Justice urge reliance on *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978), where the Supreme Court found covered under § 5 a local Board of Education rule requiring employees who became candidates for elective office to take unpaid leaves of absence. *See id.* at 34-35, 43. *Dougherty*'s reasoning was relied upon in *Huffman v. Bullock County*, 528 F. Supp. 703 (M.D.Ala. 1981) (Hobbs, J.), where the court, on a motion for preliminary injunction, held that success was likely on a claim that Bullock County's newly-imposed requirement that the county probate judge, rather than the Bullock County Commission, pay the salaries of the probate judge's office staff was subject to § 5 preclearance. *See id.* at 704-06. The reasoning of *Dougherty* and *Huffman* was that the disputed changes in those cases had a discriminatory "potential for inhibiting participation in the electoral process," *Dougherty*, 439 U.S. at 42, because they imposed new financial burdens on elected officials or "erect[ed] 'increased barriers' to candidacy." *Id.* at 43; *see also Huffman*, 528 F. Supp. at 706. The plaintiffs and the Department of Justice argue that because the disputed changes in this case all reduce in some manner the autonomy or political potency of at least some of the county commissioners in Russell and Etowah Counties, those changes similarly constitute potentially discriminatory burdens or barriers to political candidacy or participation. We find *Dougherty* and *Huffman* basically inapposite, however. The changes at issue here do not create any obstacles or financial burdens to seeking or holding office which might discriminatorily impact on certain candidates as opposed to others. To the extent the changes devalue or render

B. *Application*

1. Russell County

Because the 1979 change in Russell County reallocated authority over road operations from the individual elected commissioners, acting autonomously under the district system, to a single, appointed county engineer under the unit system, the change might, at first glance, appear covered by section 5. One crucial fact, however, militates decisively against section 5 coverage: Both before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county. Thus, there was no *change* in the potential for discrimination against minority voters. To employ a hypothetical suggested by the Department of Justice, if a county commission which consisted of members elected from single-member constituencies, *and* which followed a district system of autonomous road supervision, were to shift to a unit system placing authority in a single county-wide official, such a change might well be covered by section 5 under the reasoning of *Horry*, *Sumter*, *Hardy*, and *Robinson*. Under such a change, the voters in each district would lose their ability to elect an official with direct authority over their district's affairs; rather, they would have to share influence with all other voters of the county over the official with authority over their district's affairs. The potential for discriminatory vote dilution in such a situation, where one or more districts has a black voting majority but blacks are outvoted in the county as a whole, is too obvious to require discussion. The foregoing hypothetical is not this case, however. Prior to 1985, the individual commissioners in Russell County, while they had to be residents of the districts assigned to their respective seats, were elected by, and thus politically responsible to, *all* the voters of Russell County. The transfer of authority to the county engineer, an official appointed by and directly responsible to the Commission, a body also elected by and politically responsible to all the

---

less politically effective any particular county commissioner's office, the changes obviously impact all potential candidates for that office equally. For the reasons discussed in text, the relevant inquiry in this case concerns the potential impact of the changes on the effective representation of different voting constituencies.

voters of the county, thus effected no significant change in the influence wielded by the voters of any district.[15]

It is true that *Robinson* might be read to suggest that *any* shift of authority from an elected to an appointed official requires preclearance under section 5. *See* note 11, *supra*. We must reject such a suggestion as applied to this case, however, in view of *Robinson*'s predominant reliance, along with *Horry*, *Sumter*, and *Hardy*, on the potentially discriminatory impact on different voting constituencies. In *Robinson*, the shift was from elected officials responsible to a county-wide electorate to appointed officials responsible only to a city-wide electorate. Here the shift was from an official elected county-wide to an official appointed by a body also elected county-wide. There simple was no potentially differential impact on different voting constituencies. We note that there was no change in 1979 in the method of choosing either the commissioners or the county engineer. *Cf. Horry*, 449 F. Supp. at 993-95 (fundamental change in method of choosing county governing body, from gubernatorial appointment on recommendation of local legislative delegation to direct local election, covered by section 5). The 1979 change simply shifted direct supervision

---

[15]The dissent relies heavily on the argument that the voters of a given district exercised more authority over the commissioner from that district than over the county engineer because the district residency requirement limited the potential challengers to each commissioner to residents of that district, and on the related argument that the commissioner probably felt a natural affinity for the district in which he resided. We conclude, however, that any such effects flowing from the residency-district system would simply have been *de minimis* for present purposes. The dissent's contrary argument places undue emphasis, we believe, on the district court's finding in *Anthony v. Russell County*, Civil Action No. 961-E, man. op. at 1 (M.D. Ala. Nov. 21, 1972) (Varner, J.), that the rural commissioners of Russell County had "heretofore devoted their attention almost solely to the affairs of the district in which such member[s] reside[d]." The issue in *Anthony*, however, was the validity of the grossly malapportioned residency-district system then prevailing in Russell County, in which more than 50% of the county's voters were apportioned to only one of the three residency districts. Nothing in our reasoning in this case even remotely questions the invalidity — as determined by *Anthony* — of such a malapportionment. We merely hold that the relatively tangential impact of a residency-district system on an at-large commissioner's fundamental political loyalty to his entire at-large constituency, *in the context of assessing a shift in authority over one area of county governance from individual at-large commissioners to an entire commission*, is simply too indirect and attenuated to render such a shift a "change affecting voting" within the meaning of Section 5.

over one area of county governance from the individual at-large commissioners to the county engineer. To hold that any such shift, without more, requires section 5 preclearance would drastically expand section 5's coverage to reach even the most "ordinary or routine . . . modification[s] of the duties or authority of elected officials," in direct contravention of *Hardy*. *See Hardy*, 603 F. Supp. at 178.

We emphasize that section 5 reaches only changes with a potentially discriminatory impact on voting. *See Beer v. United States*, 425 U.S. 130, 138-39 (1976);[16] *see also id.* at 141 ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise.") (emphasis added). Thus, to the extent the plaintiffs' claim in this case is that the unit system of handling road operations has a built-in potential for discrimination because of the county engineer's lack of accountability to the voters of any individual district, as opposed to the entire county at large, the claim fails under section 5 because the same potential existed under the previous district system.[17]

For these reasons, we conclude that Russell County's shift from the district to the unit system of managing its road operations, as reflected in the May 18, 1979 resolution and the July 30, 1979 statute, is not subject to preclearance under section 5.

2. Etowah County's Common Fund Resolution

Etowah County's 1987 common fund resolution raises somewhat different issues from Russell County's 1979 change, but our conclusion is the same. It is true that the reallocation of authority embodied in the common fund resolution involved officials with different voting constituencies. As of August 1987, when the resolution was passed, the 1986 consent decree mandating a shift

---

[16] *Beer* held that a reapportionment plan's retention of two at-large city council seats was not subject to section 5 preclearance because the at-large seats had existed prior to November 1, 1964. *See id.*

[17] By the same token, nothing in our decision today precludes the plaintiffs' section 2 and related substantive claims, still pending before the district court, that the unit system in Russell County has in fact been administered with the purpose or effect of racial discrimination.

from at-large to district elections for the Etowah County Commissioners had been in effect for eight months. Two commissioners as of August 1987 had been elected from new single-member districts, and the four remaining commissioners each faced the prospect of reelection (or defeat) from single-member districts (whose boundaries were already fixed) in either 1988 or 1990. We conclude, however, that the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant in comparison to the entire Commission's authority, both before and after the disputed change, to allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need.

The plaintiffs suggested at oral argument that they sought the political "bargaining power" that would come from having each individual commissioner control one sixth of the county-wide road budget. We find as a matter of fact, however, that the individual commissioners were never, prior to the common fund resolution, given equal prorated shares of the budget over which they could exercise exclusive individual control, such that subsequent shifts in budget allocation among the districts proceeded on some kind of "horse-trading" basis. Rather, at most, the individual commissioners may have been able to set priorities regarding the expenditure of whatever portions of the road budget the entire Commission saw fit to allocate to their respective districts. It is clear that the power to set the internal spending priorities of a given quantum of budget authority pales dramatically in comparison to the power to allocate the *amount* of such budget authority in the first place. In view of the fact that the authority reallocated by the common fund resolution constituted, at most, only a small portion of one aspect of Etowah County's governmental powers, we conclude that the reallocation was simply too minor and inconsequential to amount to a change affecting voting. The common fund resolution effected no shift in authority between officials with different constituencies as to the overwhelmingly decisive and controlling budgetary powers exercised by the Etowah County Commissioners, because such ultimate budgetary powers have always been exercised by the entire Commission.

We therefore conclude that the common fund resolution is not subject to preclearance under section 5.[18]

3. Etowah County's Road Supervision Resolution

We reach a different conclusion with regard to Etowah County's 1987 road supervision resolution. The potential for discrimination posed by this change is blatant and obvious. Whereas before 1987 all the voters of Etowah County participated in choosing the commissioners responsible for road management, the 1987 resolution stripped the voters in districts 5 and 6 of any electoral influence over such commissioners.[19] Authority over the most important aspect of county governance was shifted from officials responsible to the entire county to officials (albeit the

---

[18]Of course, any system allowing a county-wide majority to set road budget priorities for every district of a county has an obvious built-in potential for discriminatorily overriding the interests of certain districts, as the repeated passage of Etowah County's road budget by 4-2 votes illustrates. But the relevant factor, as discussed above with regard to Russell County, is that the same basic potential existed both before and after the 1987 common fund resolution. As noted above with regard to Russell County, *see* note 17, *supra*, nothing in our decision today precludes the plaintiffs from maintaining their section 2 and related substantive claims against Etowah County. We in no way prejudge or suggest any view as to the merits of those claims. The plaintiffs' complaints about inequitable road budgets being forced through by 4-2 votes, and Etowah County's rejoinder that Presley's and Williams's districts have in fact received a disproportionately high amount of county road funding per county road mile, are arguments best directed to the district court in connection with those substantive claims.

[19]Etowah County suggests that the allocation of authority over road operations to the four holdover commissioners was appropriate because of the extremely small percentage of county road mileage located within Presley's and Williams's districts. Under the previous at-large election system however, the voters in what are now districts 5 and 6 exercised one-third of the voting power over the commissioners responsible for road operations; thus, regardless of the percentage of county road mileage in those two districts, the 1987 change marked a substantial reduction in those voters' influence over road operations. We note that apportioning voting power over road funding on the basis of county road mileage, aside from being a section 5-covered change under the circumstances of this case, would be inconsistent with the basic principle of one-person/one-vote. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.") (affirming and remanding *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962) (Rives, Thomas, and Johnson, JJ.) (per curiam)).

same individuals) responsible to only two thirds of the county's voters. While it is not the province of this court to decide whether this change in fact violated the 1986 consent decree or otherwise had an actual discriminatory purpose or effect, we have no difficulty concluding that the change had such a *potential*, and is thus subject to section 5 preclearance.[20]

III. CONCLUSION

We turn finally to the question of appropriate relief.[21] Because Etowah County's 1987 road supervision resolution was subject to

---

[20]Etowah County contends that Commissioner McKee, one of the four holdover commissioners, has on occasion offered to trade his road supervision responsibilities with Presley's assigned responsibilities under the 1987 resolution, and that Presley has declined. It appears that this offer was not seriously intended, and in any event such an informal offer by a single commissioner would be of dubious validity, and irrelevant to determining the preclearance issue as to the 1987 resolution.

More significantly, Etowah County points out that on January 23, 1990, the Etowah County Commission (with Williams voting "no" and Presley absent) passed a resolution providing, in relevant part:

> 4. Minor road repair, such as repair of potholes, and general road maintenance, such as grass cutting, shall not be subject to a vote of the Commission, but shall be determined by the Commissioner responsible for the district where such general maintenance and minor repair must be done.
>
> 5. With respect to the supervision of major and minor road repair and construction, each Commissioner shall supervise the work performed in his district.
>
> 6. With respect to the daily routine operation of each road shop, each Commissioner assigned to each road shop shall continue to supervise said operations.

Etowah County argues that this resolution moots the preclearance issue as to the 1987 resolution. It is clear, however, that the 1990 resolution does not entirely undo the changes wrought by the 1987 resolution. In any event, because no party has raised a section 5 preclearance claim regarding the 1990 resolution, it is not properly before this court. The 1990 resolution may simplify Etowah County's task in complying with the relief ordered in this case, but that need not concern us at this stage. If Etowah County chooses to treat the 1987 resolution, or any part of it, as repealed, and, by declining to seek preclearance of its as ordered in Part III below, chooses (as ordered in the alternative below) not to enforce it, Etowah County is perfectly free to do so.

[21]We must respectfully take issue with the dissent's assertion that we have exceeded our jurisdiction as a three-judge court. As we have emphasized, *see* notes 17 & 18, *supra*, nothing in our decision today prejudges the plaintiffs'

section 5 preclearance but was not precleared, it should never have been enforced in the first place. The presumptive remedy where a section 5 violation is found is to enjoin enforcement of the covered change until and unless it is precleared. *See Perkins*, 400 U.S. at 396 ("Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in [section 5] litigation."). The Court in *Perkins* indicated, however, that "[i]n certain

---

section 2 and related substantive claims currently pending before the district court. We do not reach the question whether black voters are denied equal voting rights under the governmental regimes currently prevailing in Russell or Etowah Counties. We merely assess, as we are required to do in accordance with our limited jurisdiction, whether the disputed *changes* in this case have any potential impact on voting sufficient to raise them to the level of "changes affecting voting." The dissent seems to overlook the fact that reallocations of authority *as such* do not, without more, have any obvious relation to voting rights; in assessing the section 5 coverage of reallocations of authority, we tread a path at the far edges of the domain of section 5 law. We are baffled, moreover, by the dissent's charge that the principle we have drawn from the relevant caselaw "is not a *legal* conclusion but a *factual* one." Dissenting op. at 12 [A-42] (emphasis in original). We do not rely on the four principal cases we have cited for any factual conclusions, and we certainly do not "attempt[] to decide how reallocations of authority work in all situations." *Id.* Rather, we agree with those cases, as a matter of simple logic, that reallocations of authority, in order to constitute "changes affecting voting," will normally have to be shown to involve officials with different voting constituencies. A specific conclusion that any given change in fact "affects voting" requires factual findings based on the record in each case. In *Dougherty*, 439 U.S. at 40-43, for example, the Supreme Court relied on factual findings that the leave-of-absence rule there at issue "impos[ed] substantial economic disincentives on employees who wish to seek elective office . . . burden[ed] entry into elective campaigns and . . . limit[ed] the choices available to [the] voters." *Id.* at 40. These findings were essential to the Court's conclusion that the challenged change "affected voting." *See id.* at 43. In this case, likewise, we must reach and decide the inherently factual threshold issue of whether the disputed reallocations of authority had any significant potential impact on voting rights.

The dissent concedes, as it must, that "there is no bright line separating an inquiry as to whether a change has a potential for discrimination from an inquiry as to whether a change is in fact discriminatory." Dissenting op. at 10. We believe this observation is especially true where, as here, we deal with purported "changes affecting voting" so far removed from the kinds of practices and policies affecting voting to which the Voting Rights Act was originally and primarily addressed. It seems to us that the dissent would resolve the recurrent problem of fixing an outer boundary on the scope of section 5 by automatically expanding, where in doubt, the scope of coverage. A line must finally be drawn somewhere, however, if section 5 is not to be stretched beyond the point of reason and beyond its legitimate purposes. We

circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and [enjoining the change] only if local officials fail to do so or if the required federal approval is not forthcoming." *Id.* at 396-97; *accord, e.g., Berry v. Doles*, 438 U.S. 190, 192-93 (1978) (officials given 30 days to apply for preclearance); *Robinson*, 652 F. Supp. at 486-87 (officials given 60 days to obtain preclearance). Under the circumstances of this case, we conclude that the appropriate remedy for Etowah County's section 5 violation is to require Etowah County to apply forthwith for preclearance of the 1987 road supervision resolution. If Etowah County chooses not to apply, or if preclearance is not obtained within 60 days from the date of this order,[22] Etowah County shall be enjoined from enforcing the resolution.

It is so ordered.

This 1st day of August, 1990.

/s/ Frank M. Johnson, Jr.

Frank M. Johnson, Jr.
United States Circuit Judge

/s/ Truman M. Hobbs

Truman M. Hobbs
United States Chief District Judge

Myron H. Thompson
United States District Judge

---

believe the line we have drawn in this case is faithful to those purposes and to the governing caselaw.

[22]The Department of Justice gave assurances at oral argument that any such request for preclearance would receive accelerated consideration, and we expect that those assurances will be honored.

HOBBS, J., concurring:

I agree fully with the careful opinion of Judge Johnson.

By its plain language, Section 5 of the Voting Rights Act requires federal preclearance before a political subdivision in certain states may enforce a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." Section 5 marked a radical departure from the judicial concept of constitutional federalism and represented an "uncommon exercise of congressional power." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). As Justice Powell noted in his dissent in *Dougherty County Board of Education v. White*, 439 U.S. 32, 38, the departure was viewed by some members of the Supreme Court as such a distortion of the constitutional structure of government as to violate the Constitution.

Section 5 of the Voting Rights Act was squarely aimed at, and by its terms was limited to, correcting abuses which could arise from changes in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," and as so limited, it has been upheld against constitutional challenge. No one on this court questions that the Voting Rights Act requires preclearance of all changes in voting practices or procedures which directly affect voting irrespective of whether such changes have any apparent potential for discrimination.

As Judge Johnson's opinion makes clear, however, the instant cases do not involve the usual categories of changes affecting voting, such as rescheduling of elections, changes in polling places, changes in candidates' residence requirements, reapportionment or redistricting plans, etc. In cases such as the instant cases, Congress did not intend and courts should not require the burdensome, time-consuming process of preclearance by the Attorney General of the United States for the mere reallocation of administrative responsibilities of officials unless the change has at least a significant, potential impact on the electoral process.

The United States, filing as amicus curiae, and the plaintiffs rely on *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978). Justice Marshall, speaking for the Court, noted that the change in *Dougherty*, which "increased barriers" to candidacy, arose out of a factual context which was "sufficiently suggestive of the potential for discrimination to demonstrate the need for

preclearance." *Id.*, 439 U.S. at 42. In *Dougherty*, the "barrier" was adopted less than a month after the first black in recent years sought election to the county governing body. In Russell County, however, the administrative change was adopted many years before blacks sought a place on the governing body and was adopted to eliminate a practice that had proved inefficient and conducive to abuses. Indeed, the practice of Russell County eventually resulted in a criminal indictment of one of the commissioners. Moreover, in the Russell County case, the resolution adopted in 1979 involved no "increased barrier" to anyone's candidacy; the change did not arise out of a factual context which even remotely suggests a potential for discrimination or discriminatory purpose. In *Dougherty*, Justice Marshall, speaking for the Court, found that the change could have a significant impact on the electoral process. I agree fully with the opinion of Judge Johnson that Russell County's 1979 shift from the district to the unit system of managing its road operation could have no such impact on the electoral process of Russell County and is not subject to preclearance.

In *Dougherty*, five members of the Court agreed that the holding in *Dougherty* went beyond congressional intent which only required preclearance of changes in practices "with respect to voting." Justice Stevens concurred in the result to make a majority only because he felt so compelled by the Court's prior decisions. *Dougherty, supra*, at p. 47. Justice Powell's dissent stated that if the rule adopted in *Dougherty* is subject to preclearance, "it is difficult to imagine what sorts of state or local enactments would not fall within the scope of that [preclearance] section." *Daugherty, surpa*, at p. 54. This is the concern of defendant Russell County in this case and it is my concern. If this longstanding practice of Russell County, adopted in 1979 without even a suggestion that it is discriminatory in origin or effect, with no logical basis for determination that it could have a significant impact or indeed any impact on the electoral process, requires preclearance by the Attorney General of the United States, it is difficult to imagine what administrative change at a local level is not subject to preclearance. Clearly, this was not congressional intent in Section 5 in requiring of certain states preclearance of changes with "respect to voting."

I agree with Judge Johnson's determination that Etowah County's common fund resolution does not require preclearance. I further agree with his determination that the Etowah County road supervision resolution has a potential for discrimination which "could be significant" and could impact significantly on the electoral process in Etowah County, *Dougherty, supra,* at p. 47, thus requiring preclearance in accordance with prior decisions of the Supreme Court.

THOMPSON, J., concurring in part and dissenting in part:

I concur in the court's judgment as to the Etowah County Commission's 1987 road supervision resolution, However, as I will explain below, I must respectfully dissent from the majority's disposition of the Etowah County Commission's 1987 common fund resolution and the Russell County Commission's 1979 reallocation of authority over road operations from individual commissioners to the county engineer. I agree with the plaintiffs and the United States that the plaintiffs are entitled to appropriate relief with regard to these two changes as well.[1]

I.

As to Etowah County's common fund resolution, I fully agree with the majority's introductory review of established case law under § 5 of the Voting Rights Act of 1965, as amended.[2] However, I disagree with the result the majority then reaches in determining whether the resolution has the "*potential* for discrimination." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181, 105 S.Ct. 1128, 1137 (1985) (emphasis in original). I do not think that the majority gives consideration to the full significance of the resolution and the critical role it could be viewed as having played in the over-all scheme for redistribution of authority among the county's commissioners. I believe that a trier of fact *could* readily reach the following conclusions about the common fund resolution.[3]

Prior to 1987, the Etowah County Commission was composed of four commissioners elected at-large from four residency districts and a chairperson elected at-large without a residency requirement.[4] The four commissioners were primarily responsible for road and bridge matters. Each maintained separate and inde-

---

1. The relief fashioned by the court with regard to the Etowah County Commission's road supervision resolution is appropriate. However, I would fashion similar relief for all the changes being challenged.

2. 42 U.S.C.A. § 1973c.

3. I emphasize "could" because it is not within the province of this three-judge court to make any final findings resolving disputed facts as to whether there has been discrimination.

4. Because the responsibilities of the chair are not critical to my disagreement with the majority's holding, I have not again described those responsibilities as they existed before and after the consent decree.

pendent authority over road and bridge repair and construction within his residency district, and each had a "county shop" within his district, with its own road crew and equipment. Each also had separate funds for his district, which he could use at his discretion. Because the four commissioners spent 90% of their time on road and bridge matters, they were known as "road commissioners".

The 1986 consent decree provided for the phasing in of a structure in which the commission will have six members elected from single-member districts rather than at-large. Under the decree, two new commissioners were elected from single-member districts in December 1986 and took office in January 1987. One of the two commissioners is black and was elected from District 5, a majority-black district created under the consent decree. These two new commissioners joined the four white incumbent or "holdover" commissioners who had been elected at large from the old residency districts.

On August 25, 1987, less than nine months after the county"s first black commissioner took office, the four holdover commissioners passed two resolutions which dramatically restructured the distribution of authority within the commission. The resolutions passed four to two, with the two new commissioners voting no. The two resolutions, working together, effectively placed beyond the reach of the two new commissioners and preserved for the four holdover commissioners the separate and independent fiefdoms the four had enjoyed prior to the consent decree. The first resolution — known as the road supervision resolution — expressly provided that the holdover commissioners would continue to maintain exclusive control of the four road shops as they had done in the past, although one of the road shops is physically located in District 5, the majority-black district.

The second resolution — known as the common fund resolution — provided in its first section that for the fiscal year 1987-88 the commission would no longer have separate district funds subject to the control of each commissioner, but would have a common fund under the control of the entire commission. At first blush, it would appear that the second resolution simply and evenhandedly abolished the authority of individual commissioners to determine how funds would be used in their districts and

instead provided for majority control by the full commission over such funds. However, a closer analysis of the resolution's other provisions as well as its over-all effect reveals that this was not true and that the common fund resolution was an essential component of a larger scheme to take the control the new commissioners had over roads and bridges within their districts and give it to the four holdover commissioners so that the four could have exclusive control. First of all, section three of the common fund resolution has a grandfather clause which preserved each holdover commissioner's control over unspent funds for the fiscal year 1986-87.[5] This provision assured that the two new commissioners would never be able to put their hands on these unspent funds. Second, section two of the common fund resolution requires that for the fiscal year 1987-88 all road maintenance must be done out of the "four present road shops."[6] Under this provision, commission funds cannot be used to pay outsiders for road work; instead, all funds must go to the road shops, which are, of course, because of the road supervision resolution, under the exclusive control of the four holdover commissioners.

Finally, the common fund resolution required, as noted in the majority opinion, that all road and bridge funds be in a common, unallocated fund under the control of the entire commission. This provision was, in effect, a Trojan Horse; while it appeared to place road and bridge matters under the control of the entire commission, it was actually a significant part of a larger scheme to

---

5. Section three of the common fund resolution provides:

> That any monies earmarked and budgeted to the various districts in the fiscal year 1986-1987, for the repair, maintenance and improvement of streets, roads and public ways in the designated districts, which has not as yet been expended in the districts, shall remain in the district to which it was allocated during the 1986-1987 fiscal year. Said funds shall be carried over in the 1987-88 budget as district allocations to that district, and shall be used in that district.

The majority omits this section when it quotes from the resolution.

6. Section two of the common fund resolution provides:

> That during the fiscal year 1987-1988, the repair, maintenance and improvement of all the streets, roads and public ways for Etowah County shall be accomplished by the road workers of Etowah County operating out of the four present road shops located in the County.

The majority omits this section when it quotes from the resolution.

place such control in the hands of the holdover commissioners exclusively. The provision worked as follows: on the one hand, section one of the common fund resolution abolished the authority of each commissioner, including the two new commissioners, to determine how funds will be spent in his district; but, on the other hand, the road supervision resolution and section two of the common fund resolution effectively gave it back, but only to the four holdovers. Because under section two of the common fund resolution funds can be given to only the four road shops and because under the road supervision resolution the four holdover commissioners have exclusive control over the road shops, the four holdover commissioners acquired exclusive control over all road and bridge funds. The effect of the common fund resolution, when considered with its companion resolution, was that no longer will all commissioners, including the two new commissioners, enjoy independent authority — or for that matter any authority — over funds for district roads, but rather that this authority will now be exercised exclusively by the holdover four, without interference from anyone else, and in particular the two new commissioners. The common fund resolution, while giving the appearance of innocently and simply redistributing authority back to the commission as a whole, was a pretext for excluding the two new commissioners from the budgetary process altogether. The two resolutions effectively recreated the four-person commission as it had previously existed with respect to road and bridge matters.

With this possible understanding of the facts, the potential for racial discrimination — in particular against the voters of District 5 — is evident. Prior to the passage of the two resolutions, the black voters of District 5 could elect, and indeed did elect, a representative with the same authority over road and bridge matters as had been enjoyed by the four white holdover members in the past. After the passage of the two resolutions, the black voters in this district no longer enjoyed any influence over roads and bridges; this authority was, in effect, reserved for the white holdover commissioners. In fact, looking to the reality of the situation, it could be reasonably argued that the District 5 commissioner is not a true commissioner — that is, that he is not a "road commissioner" as he was elected to be.

The circumstances surrounding the adoption of the common fund resolution and the road supervision resolution reflect not only a strong possibility of discriminatory *effect*, they raise the more serious spectre that the *purpose* behind the two resolutions was discriminatory. The resolutions were adopted shortly after black voters in the county gained, for the first time in recent history, direct and dominant political control over road and bridge operations in their district. In my view, if any change involving redistribution of authority could be considered a prototype for a change falling within § 5's coverage, these two resolutions as parts of an overall scheme could.

The majority nevertheless finds that the road supervision resolution has the potential for discrimination but that the common fund resolution does not. Because a trier of fact could reasonably conclude as follows, I do not believe the two resolutions can be separated. The two resolutions worked hand-in-hand; they complemented each other by assuring that the four holdover commissioners would continue to maintain their exclusive control over road and bridge matters. The intent behind both — to place all road and bridge matters under the exclusive control of the four holdover commissioners — was the same. First of all, they were passed in tandem. They were not isolated gestures, intended to address separate and unconnected concerns. Second, both resolutions were needed in order for the four holdover commissioners to achieve the complete control they desired; one resolution without the other would not have done this. The road supervision resolution without the common fund resolution would not have given the four commissioners this complete control, because to the extent the new commissioners could enjoy any independent control over funds for road and bridge work they would have shared in the authority exercised by the four holdovers; and, of course, the common fund resolution without the road supervision resolution would not have given the four holdovers the absolute control they desired. Third and finally, it is evident from the language of the common fund resolution itself that it is tied closely and directly to the road supervision resolution. As stated, in order to make their control over road and bridge matters complete, the four holdover commissioners included language in the common fund resolution that expressly

requires that all funds appropriated by the commission for fiscal year 1987-88 must be spent at their road shops. They also included express language preserving for the holdover commissioners exclusive control over unspent money already allocated for 1986-87.

The majority writes that a commissioner's authority to determine the use of funds within his own district is "insignificant in comparison to the entire Commission's authority, both before and after the disputed change, to allocate funds among the various districts." *Ante* at 26 [A-19]. This statement is true in a theoretical and abstract sense. However, it is not on point in this case for two reasons. First of all, the statement narrowly views the common fund resolution as consisting of only one provision — the one requiring that funds will no longer be earmarked for the unfettered use of each commissioner within his district. The resolution, however, contains two other significant provisions, which, as stated, expressly preserve earmarking for the holdover commissioners' unspent funds and which channel all future funds to the holdover commissioners' road shop for their exclusive use. The majority ignores these two remaining critical provisions in the common fund resolution.

The above statement also misses the point because it fails to take into account how the Etowah County Commission could reasonably be viewed as working in practice. For the commission, allocation of funds among the districts has never been a bone of contention; to the extent the resolution required the distribution of funds according to majority vote of the commission, it was a meaningless gesture. A commissioner's real authority lies instead, as I believe the four holdovers could be viewed as having concluded when they passed the common fund resolution, in how those funds are used after they are allocated. The common fund resolution and the road supervision resolution, working together, took this authority away from the two new commissioners and gave it exclusively to the four holdover commissioners. The majority's focus on how the whole commission retains ultimate authority over how funds are distributed among the districts is misplaced.

In conclusion, as I have said, I do not believe the majority gives adequate consideration to the full significance of the common

fund resolution and the critical role it may have played in the Etowah County Commission's over-all scheme for redistribution of authority with regard to road and bridge matters.

II.

Turning to the Russell County Commission, I believe that the majority again fails to assess fully and accurately all the evidence in the record.

The majority writes that the following hypothetical would present an obvious case of potential discrimination under established case law: "if a county commission which consisted of members elected from single-member constituencies, *and* followed a district system of autonomous road supervision, were to shift to a unit system placing authority in a single county-wide official, such a change might be covered by section 5." *Ante* at 22 [A-21] (emphasis in original). "Under such a change," the majority continues, "the voters in each district would lose their ability to elect an official with direct authority over their district's affairs; rather, they would have to share influence with all other voters of the county over the official with authority over their district's affairs." *Id.* at 22-23 [A-21]. The majority, however, concludes that § 5 does not cover the Russell County Commission's reallocation of authority over road operations from the individual commissioners to the county engineer, because "Both before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county." *Id.* at 22 [A-21]. The majority explains that "Prior to 1985, the individual commissioners in Russell County, while they had to be residents of the districts assigned to their respective seats, were elected by, and thus politically responsible to, *all* the voters of Russell County." *Id.* at 23 [A-21] (emphasis in original). The majority then concludes that "The transfer of authority to the county engineer, an official appointed by and directly responsible to the Commission, a body also elected by and politically responsible to all the voters of the county, thus effected no significant change in the influence wielded by the voters of any district." *Id.* (footnote omitted).

The majority's broad conclusions, however, are not supported by the facts. Admittedly, it would be reasonable to assume that

commissioners elected in a pure at-large system would conclude that they are primarily accountable to the electorate of the entire county rather than that of any particular district. However, because of one significant electoral feature this has not been the case with Russell County. The county's at-large electoral system assigns each commission seat to a particular section of the county and requires that each commissioner reside in the district he represents. This requirement has played a critical role in how the commissioners and voters perceive their relationship, as is dramatically evidenced in a 1972 lawsuit brought by Phenix City against Russell County. In that lawsuit, the city claimed that it was not being adequately represented on the county commission.[7] The suit charged, and the court specifically found, that although the three-member county commission was elected at large, "one or more members of the Commission have heretofore devoted their attention almost solely to the affairs of the district in which such member resides." *Anthony v. Russell County*, Civil Action No. 961-E, slip op. ___ (M.D. Ala. Nov. 21, 1972). The court observed that this result was due, in substantial measure, to the district residency requirement. *Id.* Although Phenix City comprised much more than 50% of the county population, it could not translate its majority into control of the commission, or any members on the commission, because two of the residency districts were located wholly outside the city. Over time, the at-large system had taken on some of the attributes of single-member districting.[8] The court responded by increasing the number of at-large commissioners from three to five, with the two additional representatives going to the Phenix City residency district.

The majority's approach to Russell County fails to take into account the historical events depicted in *Anthony v. Russell County*; in fact, the majority discounts the possibility that those events could ever occur. To me, these events can be easily understood to reflect a long-standing and continuing practice in which the commissioners and voters in the county viewed each commissioner as

---

7. The 1972 lawsuit was brought by the Mayor and members of the Board of Commissioners of Phenix City.

8. A review of the entire file in *Anthony v. Russell County* reinforces this conclusion.

accountable to only the voters of his residency district, with the result that the district voters rather than all the county voters were his true constituency. *Cf. Dallas County v. Reese*, 421 U.S. 477, 480, 95 S.Ct. 1706, 1708 (1975) (per curiam) (election of county commissioners at large from residency districts with unequal populations may violate "one-person, one-vote" if commissioners in fact represent only their residency districts). With this understanding of the facts, the Russell County Commission's 1979 reallocation of authority over road operations from individual commissioners to an appointed county engineer did not result in the transfer of authority from an official accountable to county voters at large to an official responsible to that same constituency, but rather from an official accountable to only one district in the county to an official responsible to the county at large. Before the change, power over road operations for a district was vested in an official accountable only to the voters of that residency district. After the change, road operations resided in an official accountable to all voters of the county at large. Based on the hypothetical given in the majority opinion, and restated above, the potential for discrimination is evident.

III.

I have related how I disagree with the majority's assessment of the facts behind the claim against the Russell County Commissioner. My disagreement is much broader, however. The majority writes "that reallocations of authority will generally be held to affect voting in a manner sufficient to subject them to preclearance under section 5 where they effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, *substantially different constituencies of voters*." *Ante* at 19 [A-18-19] (emphasis added). Although the majority says that it is not positing a "general theory," it quickly adds that it is "unlikely" that § 5 coverage could be found under any other circumstances. *Id.* at 20 [A-19]. To the extent the majority is suggesting, though indirectly, that § 5 coverage could only be found where there are "substantially different constituencies of voters," I must respectfully disagree.

A.

I fully appreciate, and indeed share, the majority's concern that § 5 should not be expanded to reach the "most" 'ordinary or routine . . . modification[s] of the duties or authority of elected officials.' " *Ante* at 25, *quoting Hardy v. Wallace*, 603 F. Supp. 174, 178 (N.D. Ala. 1985). However, I think that, in an effort to address this concern, the majority goes too far in its attempt to cabin the reach of § 5's coverage of reallocations of authority. It is one thing to find that a reallocation of authority involving a change in constituencies *has* a potential for discrimination. It is, however, quite a different matter to conclude that a reallocation can have a potential for discrimination *only if* there has been a change in constituencies. The first conclusion can be drawn from only one instance. The second conclusion, however, which is a universal negative inference, can only be drawn after a long empirical study. The record now before the court not only fails to support the second conclusion, it, if anything, requires a contrary conclusion.

In formulating its suggestion, the majority relies on four cases: *Robinson v. Alabama State Dep't of Education*, 652 F.Supp. 484 (M.D. Ala. 1987) (three-judge court); *Hardy v. Wallace*, 603 F.Supp. 174 (N.D. Ala. 1985) (three-judge court); *County Council of Sumter County v. United States*, 555 F.Supp. 694 (D.D.C. 1983) (three-judge court); and *Horry County v. United States*, 449 F.Supp. 990 (D.D.C. 1978) (three-judge court). The majority's reliance is misplaced for two reasons. First of all, none of these cases purports to say that a reallocation of authority can have a potential for discrimination *only if* there is a change in constituencies. Indeed, in *Horry*, the district court found to be contrary. There, the District of Columbia court's conclusion that the change "reallocates governmental powers among elected officials vote upon by different constituencies" was an "alternate reason" for finding that the change has the potential to discriminate. 449 F.Supp. at 995. The court also found that "state enactments which change a present method of electing public officials and enactments which result in electing public officials who were formally appointed" have the potential to discriminate. *Id. See also Robinson*, 652 F.Supp. at 486 (change covered by § 5 because it "changed the *means* by which

the board members who governed city schools were selected;" from a system of direct election by county voters to a system of appointment by the city counsel) (emphasis in original).

Second, with its suggestion, the majority is making a *factual* not a *legal* conclusion. It is attempting to suggest how reallocations of authority work in all situations. These four cases alone cannot support this empirical conclusion. In fact, I think that there is compelling evidence to the contrary. The Department of Justice — which is charged with the duty of determining whether a change relating to voting has a discriminatory purpose or effect and which has first-hand, day-to-day, experience in assessing whether a change is discriminatory — has expressly declined to adopt a rule regarding when reallocations of authority are covered under § 5. The Department states that "we do not believe that a sufficiently clear principle has yet emerged." 52 Fed. Reg. 486, 488 (Jan. 6, 1987). The Department's position regarding whether a rule can be formulated reflects agency policy and experience, which, if not entitled to deference from this court, should be considered highly instructive.

B.

I think that in modern-day voting rights cases such as this one, where racial discrimination will more than likely not show itself in the blatant forms of the past but instead will be subtle and sophisticated, a three-judge court should eschew generalities and instead should engage in a searching and detailed inquiry into the facts so as to ferret out even the most hidden forms of discrimination. The majority criticizes my approach by saying that I "would resolve the recurrent problem of fixing an outer boundary on the scope of section 5 by automatically expanding, where in doubt." *Ante* at 31 [A-26] n. 21. "A line must be drawn," the majority continues, "if section 5 is not to be stretched beyond the point of reason and beyond its legitimate purposes." *Id.* By suggesting that we not try to formulate generalities, I am not suggesting that § 5 be automatically expanded where in doubt. To the contrary, I am saying that there should be nothing automatic about § 5 at all, and each case should be carefully considered without unnecessar-

ily confining generalities.[9] I think that a line not only need not be drawn, but should not be if § 5 is to be flexible enough to meet and successfully combat racial discrimination in voting in all its modern-day subtle forms.

But if a line must be drawn, or a principle suggested, as the majority would have it to prevent § 5 from being stretched beyond its legitimate purposes, then, for the following reasons, I think it is sufficient that the plaintiffs show, as they have done in this case, that the reallocations of authority resulted in the black citizens of each county having less direct control over the "traditionally fundamental duties" of county government. In deciding whether a change has potential for discrimination, a three-judge court must determine, first, whether the change is related to voting and, if so, second, whether the change has the potential for discrimination. If the change does not relate to voting, that is, is not a "standard, practice or procedure with respect to voting," 42 U.S.C.A. § 1973c, then it does not fall within § 5's coverage. I think that the first issue is satisfied under those unusual circumstances where there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials. I think, however, that the burden necessary to satisfy the second issue should be very light. After all, the issue is whether the change has the *potential* for discrimination, not whether it *actually* discriminates. How a change, in fact, affected the political influence of various racial groups in a jurisdiction — and, more specifically, whether the change resulted in relative changes in powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters, or whether the change discriminated in other ways against black voters — should be left to the microscopic analysis of the Attor-

---

9. The majority could have reached the same conclusions it did without suggesting the drawing of any line. It could have simply stated that as to the claim against Russell County the plaintiffs have not shown how there was a change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters, and that they have not shown any other potentially discriminatory effect. As to the Etowah County Commission's road fund resolution, the majority could simply have stated, as did the court in *Horry*, *Sumter*, *Hardy*, and *Robinson*, that there was such a change.

ney General and the District of Columbia District Court. This approach, which by definition would not reach the "most 'ordinary or routine . . . modification[s] of the duties or authority of elected officials,' " *ante* at 25, *quoting Hardy*, 603 F. Supp. at 178, would be flexible enough to help assure that those charged with enforcing § 5 would readily reach and stamp out racially discriminatory voting schemes and practices in all their forms, both the blatant and the subtle.

This approach is in line with the instructions of the Supreme Court that the question for a three-judge court confronting a preclearance issue "is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." *Dougherty County v. White*, 439 U.S. 32, 42, 99 S.Ct. 368, 374 (1978) (emphasis in original). The approval requirements of § 5 should be given "the broadest possible scope," to reach any enactment which alters the election law of a covered jurisdiction "in even a minor way." *Allen v. State Board of Elections*, 393 U.S. 544, 566, 89 S.Ct. 817, 832 (1969).

C.

I think that, to the extent a three-judge court like ours, after finding that a change relates to voting, delves in detail into the disputed facts to conclude that a change does *not* affect black citizenry, it exceeds it jurisdiction. The majority correctly observes that "in deciding the coverage issue 'it is not our province . . . to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. . . . Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination.' " *Ante* at 12 [A-8], *quoting NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181, 105 S.Ct. 1128, 1137 (1985) (emphasis in original).

The majority, I believe, nevertheless does what the three-judge court did in the case reviewed by the Supreme Court in *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431 (1971). There, confronted with a § 5 preclearance claim, the district court proceeded to find that several changes by the City of Clanton, Mississippi — an annexation, a change in polling places, and a change from wards to at-large election of city representatives — had no discrimina-

tory effect. The Supreme Court responded that the district court had exceeded its authority, and infringed on "what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General." *Id.* at 385, 91 S.Ct. at 435.

Similarly, the majority, while claiming that it is assaying only the potential for discrimination, makes expressed findings with regard to the Etowah County Commission's common fund resolution's effect on the black voters in the county. It does the same with regard to the Russell County Commission when it concludes that the change "effected no significant change in the influence wielded by the voters of any district." *Ante* at 23 [A-22]. And with even more clarity and specificity, Judge Hobbs writes in his concurring opinion that

> In Russell County . . . the administrative change was adopted many years before blacks sought a place on the governing body and was adopted to eliminate a practice that had proved inefficient and conducive to abuses. Indeed, the practice in Russell County eventually resulted in a criminal indictment of one of the commissioners.

Ante at 2 [A-30]. I fail to see any real difference between the issues reached, and indeed resolved, by the majority with the above comments and the issues which the Attorney General or the District of Columbia District Court reach and resolve each time a challenged reallocation of authority is submitted for preclearance.[10]

In my view, as long as the Etowah County Commission's common fund resolution can be reasonably viewed, whether true or not, as part of a larger scheme to strip the black commissioner and the other new commissioner of the authority traditionally

---

10. I think that the majority may well be correct on the present record in its ultimate conclusions about the claim against Russell County. But the fact that a change is likely to be precleared is not a basis for finding that it has no potential for discrimination and is not subject to § 5. *See Dougherty County Board of Education v. White*, 439 U.S. 32, 42, 99 S.Ct. 368, 374 (1978) ("the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination") (emphasis in original).

exercised by road commissioners, then I think we should order that the resolution be subjected to scrutiny by the Attorney General or the District of Columbia District Court before it can be continued in effect. And, similarly, I believe that as long as the change made by the Russell County Commission could be viewed as giving black voters less direct control in the political process, then it should be subject to the same scrutiny.

IV.

In conclusion, I would add that, since the passage of the Voting Rights Act in 1965, county commissions across Alabama have either voluntary or involuntarily opened themselves up to more black influence as to who can serve as a county commissioner. It remains to be seen, however, whether those elected by these newly influential black voters will share in governance to the same extent as their white counterparts do today and have in the past. As the Supreme Court has recognized, significant and fundamental changes in how these county commissions have traditionally governed themselves could frustrate or impede the efforts of blacks to achieve a fair and equal opportunity to participate in the political process. *See McCain v. Lybrand*, 465 U.S. 236, 250 n.17, 104 S.Ct. 1037, 1046 n.17 (1984). The Voting Rights Act, and in particular § 5 of the Act, was specifically designed both to remove such impediments as expeditiously as possible and to prevent them from even ever arising. I do not think that the opinion issued by the majority today sufficiently serves this purpose.

Done, this 1st day of August, 1990.

/s/ Myron H. Thompson

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ED PETER MACK, NATHANIEL GOSHA, III, and LAWRENCE C. PRESLEY, individually and on behalf of others similarly situated,	)	[Filed Aug. 21, 1990]
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 89-T-459-E
RUSSELL COUNTY COMMISSION and ETOWAH COUNTY COMMISSION,	)	
Defendants.	)	

ORDER

Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge, and THOMPSON, District JUDGE.

JOHNSON, Circuit Judge:

Plaintiffs' motion to alter or amend the judgment entered in this case on August 1, 1990 is denied.

Russell County

The plaintiffs argue that this Court erred by using the 1979 at-large residency-district election system as the benchmark in determining whether Russell County's change to a unit system affected voting. They assert that the Court should have used the 1985 single-member district election system as the benchmark for measuring the 1979 change because the Department of Justice pre-cleared the 1985 system. This argument is unpersuasive because the change to a unit system took place in 1979, well before the 1985 change to single-member districts. In 1979, the individual

commissioners were elected by, and responsible to, all voters in the county. Transfer of authority over road repairs to the county engineer, an official appointed by and directly responsible to the commission, a body also elected by and politically responsible to all of the voters of the county, effected no significant change in the influence of voters from any district. The later change to a single-member district system does not alter the conclusion that the 1979 change to a unit system did not affect voting.

Etowah County

The plaintiffs challenge the Court's finding that both before and after the change to a common fund system the commission as a whole held the power to allocate funds among various districts. The plaintiffs cite no evidence tending to undermine this conclusion.

Jurisdiction

Finally, the plaintiffs assert that the Court exceeded its jurisdiction by denying plaintiffs' request for an injunction because the Department of Justice has requested that the challenged changes be submitted for preclearance. This argument is meritless; this Court's mandate is to determine whether the challenged changes are covered by section 5, and relief is inappropriate after a determination that the changes are not covered by section 5. *See McCain v. Lybrand,* 465 U.S. 236, 250 n.17 (1984); 42 U.S.C.A. § 1973c.

It is so ordered.

This 21st day of August, 1990.

/s/ Frank M. Johnson, Jr.

Frank M. Johnson, Jr.
United States Circuit Judge

/s/ Truman M. Hobbs

Truman M. Hobbs
United States Chief District Judge

Myron H. Thompson
United States District Judge

THOMPSON, J., dissenting:

I agree with the plaintiffs to the extent that they argue that, in determining whether a change in voting has the potential for discrimination, a court should take into consideration the present circumstances. I do not think a court should close its eyes to the present-day effects of a voting practice or procedure. After all, "Section 5 is . . . concerned . . . with the *reality* of changed practices as they affect Negro voters." *Georgia v. United States*, 411 U.S. 526, 531, 93 S.Ct. 1702, 1706 (1973) (emphasis added). *See also* 28 C.F.R. § 51.54(b)(1) ("In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure *in effect at the time of the submission*") (emphasis added); 28 C.F.R. § 51.54(b)(2) ("The Attorney General will make the comparison based on the conditions *existing at the time of the submission*") (emphasis added).

DONE, this the 21st day of August, 1990.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

SECTION 5 OF THE VOTING RIGHTS ACT

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinatons made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in seciton 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice,

or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court.

(Aug. 6, 1965, P. L. 89-110, Title I, § 5, 79 Stat. 439; June 22, 1970, P. L. 91-285, §§ 2, 5, 84 Stat. 314, 315; Aug. 6, 1975, P. L. 94-73, Title II, §§ 204, 206, Title IV, § 405, 89 Stat. 402, 404.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ED PETER MACK; NATHANIEL GOSHA, III; and LAWRENCE C. PRESLEY, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

RUSSELL COUNTY COMMISSION
and
ETOWAH COUNTY COMMISSION,

Defendants.

[Filed Aug. 27, 1990]

CV 89-T-459-E

Notice of Appeal

LAWRENCE C. PRESLEY hereby appeals to the Supreme Court of the United States from the Order denying an injunction (entered on 1 August 1990) and the Order denying his motion to alter or amend the judgment (entered on 21 August 1990) with regard to the ETOWAH COUNTY COMMISSION. This appeal is taken under 28 USC § 1253.

Submitted by,

/s/ Edward Still

Edward Still
714 South 29th Street
Birmingham, AL 35233-2810
205/322-6631

James U. Blacksher
John C. Falkenberry
Leslie M. Proll
Fifth Floor, Title Bldg.
300 21st Street North
Birmingham, AL 35203
205/322-1100

Act No. 79-652 H. 977 — Adams (C), Whatley

AN ACT

Relating to Russell County: to provide that all functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in the county shall be vested in the county engineer and shall be maintained on the basis of the county as a whole, without regard to district or beat lines, and to prescribe certain duties for the county engineer.

Be It Enacted by the Legislature of Alabama:

Section 1. All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

Section 2. The county engineer shall assume the following duties, but shall not be limited to such duties:

(1) to employ, supervise and direct all such assistants as are necessary properly to maintain and construct the public roads, highways, bridges, and ferries of Russell County, and he shall have authority to prescribe their duties and to discharge said employees for cause, or when not needed; (2) to perform such engineering and surveying service as may be required, and to prepare and maintain the necessary maps and records; (3) to maintain the necessary acoounting records to reflect the cost of the county highway system; (4) to build, or construct new roads, or change old roads, upon the order of the county commission; (5) insofar as is feasible to construct and maintain all country roads on the basis of the county as a whole or as a unit.

Section 2. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this act are hereby repealed.

Section 4. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved July 30, 1979

Time: 6:00 P.M.